

This Opinion is Not a
Precedent of the TTAB

Mailed: July 11, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

—
Gayla Phillips
v.
Marvin Ennis and Kayode Adeyemo

—
Cancellation No. 92070386

—
Rolanzo White of WRO Law and Strategy LLC
for Gayla Phillips

Marvin Ennis and Kayode Adeyemo, pro se

—
Before Bergsman, Kuczma, and Lynch, Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background and Evidentiary Record

Petitioner Gayla Phillips¹ seeks to cancel Registration No. 5626083 for the mark STARPOINT in standard characters, jointly owned by Respondents Marvin Ennis

¹ Petitioner Gayla Phillips previously was substituted as a party plaintiff after the original petitioner, her late husband George Phillips, died during the pendency of this proceeding. 41 TTABVUE.

and Kayode Adeyemo.² The challenged registration issued on the Principal Register for services in International Class 41 identified as:

Entertainment services by a musical artist and producer, namely, musical composition for others and production of musical sound recordings; Entertainment services in the nature of live musical performances; Entertainment services in the nature of live visual and audio performances, namely, musical band, rock group, gymnastic, dance, and ballet performances; Entertainment services in the nature of presenting live musical performances; Entertainment services in the nature of recording, production and post-production services in the field of music; Entertainment, namely, live music concerts; Entertainment, namely, live performances by a musical band; Entertainment, namely, live performances by musical bands.

The Board previously held that the only pleaded claims at issue in this proceeding are: (1) non-ownership and (2) fraud on the USPTO in connection with use and ownership allegations in the application underlying the challenged registration.³ Respondents made no salient admissions in their Answer to the Petition to Cancel.⁴

Petitioner filed a brief, arguing only the non-ownership claim.⁵ The other pleaded claim of fraud that Petitioner did not address in her Brief is waived. *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1426 n.3 (TTAB 2013) (opposer's pleaded descriptiveness claim not argued in brief deemed waived); *Knight Textile Corp. v. Jones Inv. Co.*, 75 USPQ2d 1313, 1314 n.4 (TTAB 2005) (pleaded dilution

² Registration No. 5626083 issued on the Principal Register on December 11, 2018.

³ 6 TTABVUE 4; *see also* 16 TTABVUE 2; 24 TTABVUE 3.

⁴ 11 TTABVUE.

⁵ 45 TTABVUE.

ground not pursued on brief deemed waived). Respondents did not submit a brief or any evidence, but are not required to do so, as the burden rests on Petitioner to establish her statutory entitlement and legal claims. *See* Trademark Rule 2.128(a)(1), 37 C.F.R. § 2.128(a)(1) (only the party in the position of plaintiff is required to file a brief). Petitioner has the burden of proving, even in the absence of contrary evidence or argument, that Respondents are not entitled to maintain the registration. *Yazhong Investing Ltd. v. Multi-Media Tech. Ventures, Ltd.*, 126 USPQ2d 1526, 1531 n.13 (TTAB 2018) (as defendant in cancellation, respondent not required to submit evidence or a brief, so failure to do so not treated as concession of case).

Petitioner made a submission during her assigned trial period titled “Petitioner’s Trial Brief and ACR Request.”⁶ To the extent the submission contains arguments, it was premature because briefing is scheduled after the close of all trial periods in an inter partes proceeding. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 801.01 (2022).

To the extent Petitioner intended the submission, which included 14 exhibits,⁷ to be considered as evidence,⁸ we first must address some issues surrounding the proposed evidence. Exhibits 1, 2 and 3 consist of photos of record albums. Exhibits 4,

⁶ 32 TTABVUE.

⁷ Petitioner identified Exhibit 12 as excerpted from Respondent’s application signature page, but the entire file of the challenged registration already is of record by operation of law, so the proposed exhibit would be duplicative, and we therefore need not consider it. Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1).

⁸ The Board previously noted that “Petitioner took steps ... not fully compliant with Board litigation procedure” including this submission “which ostensibly was intended as testimony.” 49 TTABVUE 2-3.

10 and 11 consist of emails. Exhibit 5 is identified as an excerpt from a contract. Exhibit 6 is a photo. Exhibits 13 and 14 are correspondence. The foregoing exhibits are not self-authenticating as printed publications or official records, are not identified or authenticated by an affidavit or declaration, and are not admissible as Internet evidence. Trademark Rule 2.122(e), 37 C.F.R. § 2.122(e); *see also Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031 (TTAB 2010); *L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1886, n.6 (TTAB 2008) (letters and emails not acceptable under notice of reliance); *Missouri Silver Pages Directory Publ'g. Corp. v. Southwestern Bell Media, Inc.*, 6 USPQ2d 1028, 1030 n.9 (TTAB 1988) (“[documents] were not specifically identified in the affidavit and cannot be considered as exhibits to the affidavit”); TBMP § 704.08. For these reasons, we give no consideration to these exhibits. *See TV Azteca, S.A.B. de C.V. v. Martin*, 128 USPQ2d 1786, 1790 n.18 (TTAB 2018).

Turning to proffered testimony, two of these exhibits suffer the same deficiency. Exhibit 7 is titled “Affidavit,” and contains the notarized signature of Kayode Adeyemo, and Exhibit 9 is titled “Affidavit” and contains the notarized signature of Lionel Job. However, we cannot consider these purported affidavits as testimony because they lack the required attestation. Trademark Rule 2.123(a)(1), 37 C.F.R. § 2.123(a)(1) (testimony may be submitted in the form of an affidavit or declaration, both of which are made under “penalty of perjury”); Trademark Rule 2.20, 37 C.F.R. § 2.20 (acceptable language for attestation); *see also* F.R.E. 603 (“Before testifying, a witness must give an oath or affirmation to testify truthfully.”); *McDonald’s Corp. v.*

McKinley, 13 USPQ2d 1895, 1897 n.4 (TTAB 1989) (“unsworn statement does not constitute testimony”).

Exhibit 8, the Affidavit of Louise West, Esq., contains the required attestation, but was executed November 15, 2019, over a year before the opening of Petitioner’s trial period.⁹ Absent a stipulation between the parties, testimony must be taken during a party’s trial period. Trademark Rule 2.121(a), 37 C.F.R. § 2.121(a); *Spotify AB v. U.S. Software Inc.*, 2022 USPQ2d 37, at *5 (TTAB 2022) (objection sustained to testimony declaration executed more than one year prior to trial); *Robinson v. Hot Grabba Leaf, LLC*, 2019 USPQ2d 149089, at *3-4 (TTAB 2019) (absent stipulation or Board order, “a testimony affidavit or declaration must be taken--that is, executed--during the assigned testimony period, as required by Rule 2.121(a)”), cancellation order vacated on default judgment, No. 0:19-cv-61614-DPG (S.D. Fla. Dec. 17, 2019). There is no such stipulation in the record and we do not infer any stipulation from the parties’ actions. Thus, we do not consider Exhibit 8.

Petitioner’s Brief also cites exhibits to the Petition to Cancel and materials submitted in connection with a summary judgment motion.¹⁰ As to the exhibits to the Petition to Cancel, subject to certain exceptions inapplicable here, exhibits attached to pleadings are not in evidence. *See* Trademark Rule 2.122(c), 37 C.F.R. § 2.122(c) (exhibits to pleadings are not in evidence and instead “must be identified and introduced in evidence as an exhibit during the period for the taking of testimony”).

⁹ 30 TTABVUE 1 (“Petitioner’s 30-day Trial Period Ends 12/28/2020”).

¹⁰ 45 TTABVUE 15-16 n.14, 16.

Turning to the materials submitted on summary judgment, as the Board explicitly advised the parties in the denial of the motion, “evidence submitted in support of or in opposition to a motion for summary judgment is of record only for consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced during the appropriate trial period. *See, e.g., Levi Strauss & Co. v. R. Joseph Sportwear Inc.*, 28 USPQ2d 1464 (TTAB 1993).”¹¹ Also, we cannot consider the content Petitioner has cited to by including Internet hyperlinks in her Brief.¹² *See TV Azteca, S.A.B. de C.V. v. Martin*, 128 USPQ2d 1786, 1790 n.14 (TTAB 2018) (providing an Internet link to an article is insufficient to make the article of record; “[t]he Board does not accept Internet links as a substitute for submission of a copy of the resulting page.”).

Ultimately, Petitioner did not successfully introduce any evidence into the record. As noted above, Respondents did not submit any evidence. Accordingly, the record consists only of the pleadings and the file of the challenged registration.

II. Statutory Entitlement Not Proven¹³

Statutory entitlement is a threshold issue that a plaintiff must prove in every inter partes case before the Board. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). “The facts regarding

¹¹ 24 TTABVUE 11 n.19.

¹² 45 TTABVUE 15.

¹³ Despite the shift in nomenclature from “standing,” our prior decisions and those of the Court of Appeals for the Federal Circuit that refer to “standing” in interpreting Trademark Act Sections 13 and 14 remain applicable.

[statutory entitlement] ... are part of [a plaintiff's] case and must be affirmatively proved. Accordingly, [a plaintiff] is not entitled to [statutory entitlement] solely because of the allegations in its petition.” *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). To establish entitlement to a statutory cancellation cause of action under Section 14 of the Trademark Act, 15 U.S.C. § 1064, Petitioner must demonstrate a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at *3 (Fed. Cir. 2020), *cert. denied*, 142 U.S. 82 (2021); *see also Empresa Cubana Del Tabaco*, 111 USPQ2d at 1062; *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

In this case, Petitioner’s lack of evidence prevents her from crossing this threshold. Mere pleading does not suffice, as “[t]he facts regarding [statutory entitlement], we hold, are part of a petitioner’s case and must be affirmatively proved.” *Lipton v. Ralston Purina*, 213 USPQ at 188-89. As noted above, Respondents did not admit any pleaded facts that would establish Petitioner’s necessary showing.¹⁴ While Petitioner’s Brief asserts various interests in the mark at issue, “[a]ttorney argument is no substitute for evidence.” *Zheng Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284 (Fed. Cir. 2005)); *see also In re Simulations*

¹⁴ Petitioner’s Brief states, “Registrants did not admit any salient allegations.” 45 TTABVue 7.

Publ'ns, Inc., 521 F.2d 797, 187 USPQ 147, 148 (CCPA 1975) (“Statements in a brief cannot take the place of evidence”). The record lacks proof of Petitioner’s real interest in the proceeding and her reasonable belief of damage.

III. Conclusion

In sum, there is no evidence properly of record that establishes Petitioner’s statutory entitlement to this proceeding. This failure of proof alone is a sufficient basis to deny Petitioner’s petition to cancel. *See Lumiere Prods., Inc. v. Int’l Tel. & Tel. Corp.*, 227 USPQ 892, 893 (TTAB 1985). However, even if Petitioner had proven the requisite statutory entitlement, there is no evidence properly of record to prove Petitioner’s non-ownership claim.

Decision: The petition to cancel is denied.